No. 95.

Br. of Rose for Appellee.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

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JOHN W. McDONALD, RECEIVER OF THE CAPITAL NATIONAL BANK OF LINCOLN, NEBRASKA,

*Appellant,*

*v.*

DAVID E. THOMPSON,

*Appellee.*

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*APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.*

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# BRIEF OF APPELLEE.

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HALLECK F. ROSE,
*Counsel for Appellee.*

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## BRIEF OF APPELLEE.

### I.

### Statement of the Case.

THE case is here on appeal from the judgment of the United States circuit court of appeals for the eighth circuit, affirming a decree entered in the circuit court for the district of Nebraska, dismissing complainant's bill. Suit was brought, after the making of an assessment by the Comptroller, to enforce the individual liability of the shareholders of the Capital National Bank of Lincoln, Nebraska, created by the National Banking Act (Rev. St. U. S. sec. 5151). The assessment made by the Comptroller was levied pursuant to the provisions of

section 5234, Revised Statutes U. S., which provides among other things, that the receiver appointed by the Comptroller may, if necessary to pay the debts of the association, enforce the individual liability of the stockholders.

Mr. Thompson is the sole defendant. In the original bill (pp. 4, 5, Printed Record) there was a prayer that a transfer of the shares formerly owned by defendant to Charles W. Mosher, Richard C. Outcalt and Esther C. Barton be set aside. In the amended bill, however, the only relief prayed is a decree that defendant pay the assessment made by the Comptroller upon said shares, to the amount of $21,000 and interest (p. 14, Printed Record). In the circuit court a demurrer to the amended bill was sustained. The grounds assigned for the demurrer were the following:

1. That the complaint hath not in and for his said bill made or stated such a case as entitles him, in a court of equity, to any discovery from this defendant, or to any relief against him as to the matters contained in said bill, or any of such matters.

2. That it appears by the said amended bill that Charles W. Mosher, Richard C. Outcalt, and Esther C. Barton, mentioned and described in said amended bill as transferees of the certain 210 shares of the capital stock of the Capital National Bank, alleged to have been previously held by defendant, and each of them are necessary parties defendant, without whom no relief can be had in equity against said alleged transfer, and that there is, therefore, a defect of parties defendant to said amended bill.

3. That the complainant is not entitled upon said amended bill to the relief he prays for, because he had a plain and adequate remedy at law.

4. That the complainant is not entitled upon said amended bill to the relief he prays for, because it appears by the said amended bill that the cause of action therein set forth, and by complainant sought to be enforced against defendant, accrued more than four years prior to commencement of suit, and is, therefore, barred by the statute of limitations.

II.

**It appears on the face of the bill that complainant's cause of action is barred by the statute of limitations.**

THE ruling of the circuit court was that the cause of action was barred by the Nebraska statutes of limitation. The statutes of Nebraska prescribing the time for commencement of civil actions are sections 5 to 27, inclusive, of the Code of Civil Procedure. (Compiled Statutes Neb.) The provisions governing the present action are as follows:

Section 5. Civil actions can only be commenced within the time prescribed in this title after the cause of action shall have accrued.

Sec. 11. Within four years an action upon a contract not in writing, express or implied; an action upon a liability created by statute other than a forfeiture or penalty.

The settled policy of congress has been to permit rights created by its statutes to be enforced in the manner and subject to the limitations prescribed by the laws of the several states. The statutes of limitations are equally binding on courts of equity and courts of law. (*Campbell v. Haverhill*, 155 U. S. 610; *Hayden v. Thompson*, 17 C. C. A. 592; *Butler v. Pool*, 44 Fed. 586; *Miles v. Virian*, 25 C. C. A. 212; *Cockrill v. Butler*, 78 Fed. 687.)

The rule under which the federal courts have uniformly held the state statutes of limitations to apply to causes arising under federal laws is expressed in a federal statute (Rev. St. U. S. sec. 721), which provides as follows:

The laws of the several states, except where the constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply.

The statute imposing the liability sought to be enforced, being in derogation of the common law, is to be strictly construed, and not extended beyond its plain terms. (*Dane v. Dane Mfg. Co.*, 14 Gray (Mass.) 488; *Gray v. Coffin*, 9 Cush. (Mass.) 192, 199; *Ripley v. Sampson*, 10 Pick. (Mass.) 371; *Coffin v. Rich*, 45 Me. 507, 511; *Hooper v. Slate Co.*, 71 Pa. St. 293; *Appeal of Means*, 85 Pa. St. 75; *Libby v. Tolcy*, 82 Me. 397; *Chase v. Lord*, 77 N. Y. 1.)

*Carroll v. Green*, 92 U. S. 509, expressly holds that the individual liability of shareholders rests upon an implied promise, resulting from their accepting the stock burdened with the statutory provisions creating such liability. From the syllabus we quote as follows:

*Held*, That as the liability of the stockholders arose from their acceptance of the act creating the corporation and their *implied promise* to fulfill its requirements the proper remedy was an action upon the case, and that as the statute barred such an action at law, it was also a good defense in equity.

In the opinion it is said:

By taking the stock the terms were acceded to, the contract became complete, and the stockholders were bound accordingly. The same result followed which would have ensued under like circumstances between individuals. The assent thus given, and the *promise implied*, are of the essence of the liability sought to be enforced. (92 U. S. 513.)

The court, therefore, held that the action was governed by the statute of limitations regulating actions on implied contracts, which, in South Carolina, as in Nebraska, barred the action in four years.

In *Terry v. McClure*, 103 U. S. 142, it was held that the statute of limitations is a bar to a suit, brought four years after a bank in South Carolina had permanently suspended specie payments, by a holder of its notes, to enforce the individual liability of the shareholders. This

decision expressly approved and followed the former holding in *Carroll v. Green*; so also did the case of *Godfrey v. Terry*, 97 U. S. 171.

In *Terry v. Little*, 101 U. S. 216, it was said by Chief Justice WAITE:

The individual liability of stockholders in a corporation is always a creature of the statute. It does not exist at common law. The first thing to be determined, in all such cases, is, therefore, what liability has been created?

In *First National Bank v. Hawkins*, 174 U. S. 372, 19 Supt. Ct. 742, Mr. Justice SHIRAS, speaking of the nature of the individual liability of stockholders in national banking associations, said:

Undoubtedly the obligation is declared by the statute to attach to the owner of the stock, and in that sense may be said to be statutory; but, as the ownership of the stock, in most cases, arises from the voluntary act of the stockholder, he must be regarded as having agreed or contracted to be subject to the obligation.

In *Metropolitan R. Co. v. District of Columbia*, 132 U. S. 1, the action was brought by the District of Columbia, a municipal corporation, to recover from a street-railroad company the cost of maintaining pavements in a street, which the company was, by its charter, bound to maintain. The charter was granted by an act of Congress. One of the defenses interposed to the action was the statute of limitations. In the opinion delivered by Mr. Justice BRADLEY, it was said:

The court below, in its opinion on the demurrer, suggests another ground, having relation to the form of the action, on which it is supposed that the plea of the statute of limitations in this case is untenable. It is this, that the action is founded on a statute, and that the statute of limitations does not apply to actions founded on statutes or other records, or specialties, but only to such as are founded on simple contract or on tort. We think,

however, that the court is in error in supposing that the present action is founded on the statute. It is an action on the case upon an implied assumpsit arising out of the defendant's breach of a duty imposed by statute, and the required performance of that duty by the plaintiff in consequence. This raised an implied obligation on the part of the defendant to reimburse and pay to the plaintiff the moneys expended in that behalf. The action is founded on this implied obligation, and not on the statute, and is really an action of assumpsit. The fact that the duty which the defendant failed to perform was a statutory one does not make the action one upon the statute. The action is clearly one of those described in the statute of limitations. The case of *Carroll v. Green*, 92 U. S. 509 (23: 738) is strongly in point. That was a bill against stockholders of an insolvent bank to enforce their liability for double the amount of their stock, according to the provisions of the charter. It was held by this court that the liability of the stockholders arose from their acceptance of the charter, and their implied promise to fulfill its requirements, and that the legal remedy to enforce it was an action on the case, to which the statute of limitations would apply; and hence, that it applied to a bill in equity founded on the same obligation.

"In the foregoing precedents it must be conceded to be the established rule of this court that the liability of the shareholder, under the statute, rests upon an implied contract not in writing. The rule of limitations barring "An action upon a contract, not in writing, express or implied" has been applied, without exception, in this court. Under these precedents the stockholder, it is true, is held to have impliedly assumed the statute burden imposed, and the action to enforce the liability is upon such implied promise. The shareholder is not held to have made any *express* agreement, either verbal or written, to pay for the benefit of creditors, in event of the insolvency of the association, a sum equal to the capital stock held by him. That obligation is expressly imposed by the inherent and

superior force of the statute alone. If this specific statutory requirement had no existence, then the liability of the shareholder would not subsist; but the right to own and hold the shares of stock would remain. The implied promise therefore is raised upon the statute, and is a mere incident of the statute-burden, and does not arise out of any express contract in writing executed by the shareholder.

It is also the settled rule in this court that the statute of limitations commences to run against a stock subscription, payable as called for, from the date of the call. *Hawkins v. Glenn*, 131 U. S. 319; *Glenn v. Liggett*, 135 U. S. 533; *Glenn v. Marbury*, 145 U. S. 499.)

In *Van Pelt v. Gardiner*, 54 Neb. 705, the supreme court of Nebraska, whose judgments must be conceded to be authoritative upon the interpretation of the statutes of limitations of that state, here under consideration, refers to the four years' limitation as applicable to actions to enforce individual liability of stockholders, as a matter of course.

The federal courts, subordinate to this court, have, without exception, applied the rule adopted by the lower courts in the case at bar, when called upon to interpret and apply the authoritative rules of limitations announced by this court in the cases above cited. The assessment made by the Comptroller is held, by analogy, equivalent to a call upon the shareholder; and under the authority of *Glenn v. Marbury*, 145 U. S. 499, cited by Circuit Judge CALDWELL in the case at bar, the cause of action on the assessment is held to have accrued on the day when, by the terms of the order of the Comptroller, it is made due and payable. Suit against the shareholder being maintainable at that date, the statute of limitations then commences to run.

*Aldrich v. McClaine*, 106 Fed. 791, was a case decided by the circuit court of appeals for the ninth cir-

cuit, February 14, 1901, reviewing a decision of the circuit court for the western district of Washington (98 Fed. 379). The case involved the identical question that is raised on this record by Mr. Thompson. The statute of limitations of the State of Washington, which controlled the decision, provided that "an action upon a contract or liability, express or implied, *which is not in writing and does not arise out of any written instrument*" may be commenced within three years after the cause of action shall have accrued.

*Thompson v. German Ins. Co.*, 76 Fed. 892, was a suit prosecuted in the United States circuit court for the district of Nebraska, to recover an assessment made by the Comptroller. The procedure was the same as in the present suit, except that the transferees were impleaded as defendants to the bill. In his opinion sustaining a demurrer to the bill, SHIRAS, District Judge, said:

> The next ground urged in support of the demurrers is that the bill, upon its face, shows that the proceeding is barred by the lapse of time under the provisions of the statutes of the state of Nebraska, which provide that * * * actions upon contracts not in writing, express or implied, and actions upon a liability created by statute, other than a penalty or forfeiture, must be brought within four years after the right of action has accrued. (Compiled Statutes Neb. 1895, 5599-5601.)
>
> In the case at bar no suit was commenced until after the expiration of four years after the assessment was made by the Comptroller. It is well settled that the statute begins to run from the date the call or assessment becomes due and payable. (*Hawkins v. Glenn*, 131 U. S. 319, 9 Sup. Ct. 739; *Glenn v. Liggett*, 135 U. S. 533, 10 Sup. Ct. 867; *Glenn v. Marbury*, 145 U. S. 499, 12 Sup. Ct. 914; *Liggett v. Glenn*, 2 C. C. A. 286, 51 Fed. 381.)

A demurrer was subsequently sustained to an amended bill filed in the same case, the opinion by the same judge being reported in 77 Fed. 258.

In *Hutchings v. Lampson*, 82 Fed. 960, Judge GROSSCUP,

in applying the limitation of five years prescribed by the statutes of Illinois for bringing suit upon an oral contract, to a suit against a stockholder for enforcement of a statutory liability, said:

The legal source of liability in actions like this, which seems to have met the approval of the supreme court of the United States (*Carroll v. Green*, 92 U. S. 509), may be stated as follows: The shareholder acquiring stock in a Kansas corporation impliedly undertakes, by virtue of the constitution and laws of Kansas entering into the contract, to be personally liable to creditors of the corporation to the extent of his stock, in the contingency that the corporation itself cannot pay its debt. The liability, therefore, is a contract liability and resides in the act of accepting the stock of such a corporation. The action upon such liability is not, therefore, upon a written promise or undertaking to pay money, nor upon any judgment, but upon the stockholder's implied promise in his act of accepting the stock. In this view of the case, the five-year limitation applies. It follows, therefore, that the demurrer to the declaration must be sustained.

*Uhrich v. Yates*, 95 Fed. 81, cited by appellant, is a ruling by District Judge EVANS made in the circuit court for the district of Kentucky. In that case the Comptroller, in the first instance, had only made an assessment of $16 per share. That officer later ascertained that this assessment was insufficient and, the individual liability of the stockholders not having been exhausted, made a further assessment of $5 per share. The case involved the power of the Comptroller to make a second assessment. Having held the power to exist, the rule of limitation for its enforcement was held to be the same as upon an original assessment. In the opinion it is said:

The plea of the statute of limitations raises the other question to be determined. The provision of the law applicable to the case is contained in section 2515 of the Kentucky Statutes, which provides that actions upon

*liabilities created by statute* shall be brought within five years after the cause of action accrued, when the statute creating the liability fixes no other period. * * * The general liability of the shareholder is created by operation of the statute *eo instanti* his becoming a shareholder, but there did not then arise a cause of action upon that liability. * * * The right to enforce that liability by suit could not arise * * * until the amount needed was ascertained and fixed by the comptroller. * * * That a right of action would have accrued on the first assessment as soon as there was a demand for its payment is clear. If the then receiver, in that instance, had sued for more than $16 per share then assessed, could he have recovered for the excess? Clearly not; and the reason necessarily is that no cause of action for a greater sum had then arisen. * * * The liability in general terms exists; but a cause of action upon that liability—that is to say, the right of the receiver to sue upon it—does not exist nor arise until the assessment is made by the comptroller, for until that time the amount is neither due nor demandable. * * * The conclusion I have reached is that the right of action in this case exists by virtue of those acts of the comptroller called "assessments," and that the remedy is not barred by any statute of limitations, because the right of the receiver to sue did not arise until long after March 4, 1891.

The opinion quoted from cites and expressly follows the ruling of Judge SHIRAS, made in the district of Nebraska in *Thompson v. Ins. Co.*, 76 Fed. 892 and 77 Fed. 258, applying the four years' limitation. It has since been held in the circuit court of appeals for the ninth circuit that the comptroller has power to make a second assessment, where the aggregate does not exceed the par value of the stock, and that his determination of the necessity therefor is conclusive on the stockholder. (*Ulrich v. Campbell*, 97 Fed. 663.) So far as these cases involve the question of limitation, they seem to support the contention of appellee that the cause of action arises upon the making of the assessment, and that the statute com-

mences to run when, by the terms of the Comptroller's order, the assessment is due and payable.

Counsel for appellant evidently neglected to pursue the case of *Scott v. Latimer*, 33 C. C. A. 1, further than the court of appeals. In view of their harsh criticism of the opinion of District Judge SHIRAS, and their maintenance of the doctrine contended for in the dissenting opinion of Circuit Judge SANBORN, indulged at pages 45 and 46 of their brief, it will doubtless be embarrassing to them to learn that the identical judgment was reviewed by this court and that the majority opinion delivered by the district judge was approved.

*Scott v. Downes*, 180 U. S. 202, was on writ of error to review the judgment rendered in the case of *Scott v. Latimer*, 33 C. C. A. 1 in the circuit court of appeals for the eighth circuit. The case was by a receiver of a national bank to recover from a stockholder the amount of an assessment made by the Comptroller of the Currency. Defendant claimed the right to rescind his subscription by reason of fraud and false representations made to induce it. Judgment was in favor of the receiver on the pleadings, notwithstanding the answer contained averments of fraud sufficient to avoid the shareholder's contract of subscription. The superior force of the statute imposing the liability was held to be controlling; and it was adjudged effective to hold the shareholder answerable to the assessment in spite of the infirmity in his subscription contract. That holding is not reconcilable with the contention of appellant that the liability inheres in the contract of subscription. From the opinion by MR. Justice HARLAN we quote the following:

But immediately upon the failure of the bank the rights of the creditors attached *under sec. 5151*, and a shareholder who was such when the failure occurred could not escape the individual liability *prescribed by that section* upon the ground that the bank had issued to him a certificate of stock before, strictly speaking, it had authority to do so. * * *.

The present suit is primarily in the interest of the creditors of the bank. *It is based upon a statute* designed not only for their protection, but to give confidence to all dealings with national banks in respect to their contracts, debts, and engagements, as well as to stockholders generally.

In *Delano v. Butler*, 118 U. S. 634, the payment of a voluntary assessment of one hundred per cent. by the shareholders was held not to affect the statutory liability.

*Cockrill v. Butler*, 78 Fed. 679-687, was a suit in equity brought by the receiver of the First National Bank of Little Rock against directors of the bank to enforce a liability imposed upon them under the provisions of section 5239 of the Revised Statutes of the United States. It was held that the proper remedy at law would have been an action on the case; and the remedy at law being barred by the statute of limitations, the action in equity was also barred.

In *Hayden v. Thompson*, 17 C. C. A. 592, the four years' limitation provided by the Nebraska statute was applied to a suit in equity by the receiver of the Capital National Bank to recover from stockholders the amount paid to them in dividends improperly declared.

The New York decisions seem to have taken the lead in holding that the individual liability of shareholders to the creditors of the corporation is founded on contract. If this contract is the written certificate of shares issued by the corporation, then it is a contract under seal, for the corporation must issue its stock certificate under its seal. The statute of limitations for actions on contracts under seal in New York is twenty years. For actions on express or implied contracts the limitation is six years. The New York courts have invariably held that the action to enforce this liability is barred in six years. (*Corning v. McCulloch*, 1 N. Y. 47; *Wyles v. Suydam*, 64 N. Y. 173; *Flash v. Conn*, 109 U. S. 371, 377.)

*Hawkins v. Furnace Co.*, 40 O. St. 512, was a suit against shareholders to enforce a statutory liability under a section of the Ohio statutes reading as follows:

All stockholders * * * shall be deemed and held liable to an amount equal to their stock subscribed in addition to said stock for the purpose of securing the creditors of such company.

In the opinion it was said:

The liability of the stockholder is to pay the debt of the corporation, not his own debt. His obligation is distinct and *dehors* that of the company. Being a mere collateral security or promise it must have a fixed limitation. We cannot accede to the proposition that the limitation is shifting and diverse, corresponding identically to the unexpired periods of limitation on the corporate debts. If the statute had made the liability primary and direct, thus binding the stockholders to the very terms of the corporation debt, a suit to enforce the liability would be virtually against him as original debtor, and upon the debt, and its proper limitation would apply. But as already stated no such liability is imposed. On the contrary, as we have seen, the provision is secondary and in the nature of, if not purely, a suretyship clearly definable and not at all coincident with the principal obligation. * * * His [plaintiff's] company became insolvent. He has his action in virtue of the statute. Without the statute there is no right of action. Is this statute liability within the six years' limitation, either as a liability created by statute, or an implied promise? The action is governed by the limitation act of 1852 (S. & C. 948). One of its provisions is this: "Within six years. An action upon a contract not in writing, express or implied. An action upon a liability created by statute other than a forfeiture or penalty."

We think the action falls within this limitation, and is properly of the class described in the latter clause. It also embraces the elements of an implied contract. * * * We therefore interpret the phrase, "a liability created by statute," to mean a liability which would not exist but for the statute. The stockholder, it is true, may be said to

impliedly assume statute burdens previously imposed; and if the parol promise only could furnish a bar, we would for the reasons stated be bound to apply it.

And such was the situation in *Carroll v. Green*, 92 U. S. 509. * * * The court held that the stockholder impliedly assumed the individual liability imposed by the charter, and that the action was barred in four years. In that case there was but the one limitation. In this case we find a promise running with the statute liability. Both are barred by statute. The assumpsit is an incident to the statute liability. But the inherent and superior force of the statute creates the obligation without regard to the promise raised by implication. There was no error, therefore, in sustaining the demurrer.

Recurring now to the amended bill (pp. 11-14, Printed Record) to ascertain the date when appellant's cause of action is alleged to have accrued, we find that interest is claimed from July 10, 1893, and that the bill contains the following averment:

Whereas upon a proper accounting by the receiver theretofore appointed to collect the assets of the Capital National Bank of Lincoln, Nebraska, and upon a valuation of the uncollected assets remaining in his hands, it did appear to the satisfaction of said comptroller that in order to pay the debts of the said association it is necessary to enforce the individual liability of the stockholders therefor, to the extent thereinafter mentioned, as prescribed by sections 5151 and 5234 of the Revised Statutes of the United States; that thereupon, by virtue of the authority in him vested by law, he did thereby make assessment and requisition upon the shareholders of the Capital National Bank of Lincoln, for three hundred thousand dollars, to be paid by them ratably on or before the 10th day of July, 1893; and that he did thereby make demand upon each and every share of the capital stock of said association held or owned by them respectively, at the time of its failure, and thereby directed Kent K. Hayden, former receiver, by the name and designation of K. K. Hayden, the receiver theretofore appointed, to take all necessary proceedings, by suit or otherwise, to

enforce to that extent the individual liability of the said shareholders; and has since directed your orator in all things to carry out said duties and instructions.

The original bill (p. 1, Printed Record) was filed May 20, 1898, a period of four years, eleven months and ten days subsequent to the date of the assessment sued on, and four years ten months and ten days subsequent to the date when, under the express terms of the order of the Comptroller, the assessment became due and payable. On the theory most favorable to appellant his cause of action for enforcement of the assessment accrues July 11, 1893, and under the four years' limitation, prescribed by the statutes of Nebraska, had been barred for nearly a year before the filing of the original bill. The demurrer upon this ground was, therefore, properly sustained.

While it is not now an open question in this court, and the cause of action sued on, under the many and repeated rulings above cited, is confessedly barred by the limitation applicable to "an action upon a contract, not in writing, express or implied," still there naturally arose in the lower courts an inquiry as to whether the action was not intended to be comprehended within the Nebraska statute applicable to "an action upon a liability created by statute, other than a forfeiture or penalty." It may well be doubted whether any effect can be given to that provision, if actions of this character be excluded from its operation. There are respectable precedents favoring its application here. (*Hawkins v. Furnace Co.*, 40 O. St. 512; *State v. Baker Co.*, 24 Ore. 146; *Ulrich v. Yates*, 95 Fed. 81.) In these cases it was conceded that the liability was contractual, in the sense that the stockholder, by voluntarily assuming that relation, *impliedly assented* to the statute-burden. Suit to enforce that liability was nevertheless held to be "an action upon a liability created by statute," as that phrase is employed in statutes fixing a limitation for commencement of suit. The authority of standard text writers is found to sup-

port the same doctrine. (2 Thompson Com. Law of Corp. sec. 1991; 3 Id. sec. 3098; Freeman's note to *Freeland v. McCulloch*, 43 Am. Dec. 703.) The Ohio case attempted to reconcile this view with the case of *Carroll v. Green*, 92 U. S. 509.

The Nebraska statute, however, fixes the same limitation for the action founded upon a statute that is prescribed on a contract not in writing. It is not material in this case whether these views are reconcilable, because, under either line of the precedents cited, the appellant's case is barred. Judge CALDWELL of the circuit court of appeals, therefore, very properly declined to follow the divergent lines of authority, because the same limitation must, in either case, apply; and in any event, by the rule announced in many cases by this court, the appellant is confessedly barred by the limitation applicable to "an action upon a contract not in writing." The cases cited amply justify the directness and brevity of the opinion delivered in the lower court.

III.

## Appellant's brief presents no meritorious argument against applicability of the four years' limitation.

The suggestion of appellant's counsel, found in the first and second points of their brief, that the fund sought to be recovered in this action is a trust fund *in esse*, held by the appellee in the right of a trustee, so that the statute will not be set in motion till after an affirmative disavowal by the trustee of his trusteeship, is so foreign to the character of the proceeding and the nature of the liability sought to be enforced, as to be manifestly absurd. Imagine a proceeding, criminal or civil, against Mr. Thompson for misappropriation of this so-called trust fund! It is not a fund *in esse* that is here sought

to be followed and reclaimed. On the contrary, the purpose of suit is enforcement of a mere civil liability, for which a simple suit at law is the usual, and ordinarily the only, remedy permissible. By what provision of the banking act does the stockholder become trustee of a fund which he holds in the right of the comptroller? How and from what source is this trust fund derived? Who, in advance of the assessment, is its custodian? Who could be held to answer, or be convicted, for its embezzlement or misappropriation? It is too plain for disputation that the only rights vested in the receiver by virtue of the assessment by the Comptroller, is a cause of action for recovery of an ascertained sum, for creation of a fund in the future. After the fund is collected it then becomes a trust, the receiver's hand being the first to impress that character upon it. The shareholder's only liability is to answer for the statute-imposed burden, and he has of right a day in court before the burden can be enforced.

In the case of *Hayden v. Thompson*, 17 C. C. A. 592, there was ground for contending that the subject of the action was recovery of a trust fund requiring a disavowal of the trust by the trustee to set the statute running. There the original fund had an existence in fact, its title being vested in the bank. The stockholders had received dividends declared and paid out of the capital stock of the bank and deposits, a fund which, under the banking act, was not subject to be so paid. But even in that case the statute of limitations was held to run in favor of the innocent stockholders or directors, taking the money in the belief it was paid from profits, from the date of its receipt. The trust fund theory was not sufficient to avoid the running of the statute. The same rule was held subsequently by the United States supreme court in the case of *McDonald v. Williams*, 174 U. S. 397.

*King v. Armstrong*, 34 N. E. [O.] 163, cited by appellant at page 48 of his brief, as a strong indorsement of his

position, does not have the remotest application to any point raised on this record. It was a suit by a stockholder delinquent on his assessment, and who was also a depositor in the failed bank, against the receiver to recover his ratable dividend from the funds in the receiver's hands. The plaintiff was himself debtor to that fund, and was in equity held to pay his own debt into the fund, as a condition of sharing with other creditors in distribution. This right of equitable set-off rests on grounds entirely foreign to any doctrine urged as controlling in the case at bar. It is applied to distributees of estates, in cases where an heir or distributee was owing the ancestor at the date of his decease; and the rule has also been held against a principal contractor in the distribution of funds realized on mechanics' liens, where the rights of subcontractors are involved, to whom the principal contractor is himself debtor. In such cases, although the liens, independent of the relation of debtor and creditor between the claimants, would be of equal priority, the principal contractor, who is himself debtor, is permitted to share in distribution only upon performing his own personal obligation.

Nor is there any merit in the point argued that the liability of the stockholders continues so long as there are unpaid claims enforceable against the corporation. The allowance of a claim against the corporation by the receiver does not operate to suspend the statute of limitations in favor of the stockholder. No case is cited holding to this point. The rule in California, to which appellant makes reference, is directly to the contrary. There it is held that a suspension of the right of action against the corporation, under their peculiar constitution and laws, as by renewal or extension of time for payment, does not operate to extend the cause of action against the stockholder. There the action is held to be statutory and governed by the special limitation pro-

vided for actions of that character. (*Green v. Beckman*, 59 Cal. 545; *Moore v. Boyd*, 74 Cal. 167; *Stilphen v. Ware*, 45 Cal. 110; *Young v. Rosenbaum*, 39 Cal. 646; *Hyman v. Coleman*, 82 Cal. 653.) This last suggestion, that the liability is a continuing one against the stockholder, is contrary to the express holdings of the United States supreme court in *Carroll v. Green*, 92 U. S. 509, *Terry v. McClure*, 103 U. S. 442, and *Metropolitan R. Co. v. District of Columbia*, 132 U. S. 1-13.

The suggestion that a demand must be made, and the position of the shareholder one of declared hostility to the receiver, before institution of suit, is likewise without merit, and has no application to this case under the averments of the bill. As before noted, the bill alleges the making of a demand on the shareholders at the specific date of June 10, 1893. Under the authorities cited by appellant, the cause of action then matured, and the statute of limitations began to run in favor of the shareholder, when, by the terms of the order, the assessment was payable. In this connection it is to be admitted that the Illinois court has held that the shareholder's liability under their statute was upon the debt owing by the corporation. This is the solitary holding to this effect. The doctrine has not elsewhere met with judicial sanction, but has been expressly disapproved, not only by the federal courts, but by the courts of the country generally. The case of *Schalucky v. Field*, 16 N. E. 904, cited by appellant, was a ruling made upon an *ex parte* hearing, there being no brief or argument for the appellee in whose favor judgment had been rendered in the lower court. This fact is noted in the opinion by the court; so it does not appear to be a well considered case. The other Illinois case cited, from the court of appeals, was by a tribunal whose duty it was to follow the precedents of the court of last resort of the same state. The Illinois court, however, has since, in the case of *Tuttle v. National*

*Bank*, 161 Ill. 497, held that a right of action against a stockholder of a corporation ordinarily exists only by virtue of some statutory enactment. It did not exist at common law; and it was accordingly ruled that an action to enforce a liability created by the constitution and laws of another state was not maintainable in the courts of Illinois. It is impossible to reconcile this holding with the case of *Schalucky v. Field*, cited in appellant's brief. It must, therefore, be admitted that the Illinois courts have not been consistent with themselves on this question, and that no reliance can be placed upon this isolated holding. The doctrine last noted, announced in *Tuttle v. Bank*, has also been applied in the case of *Mead v. Davis*, 84 Ill. App. 558. Since then Judge GROSSCUP refused to apply the rule in the early Illinois case when sitting in the United States circuit court for the district of Illinois, and expressly held in the case of *Hutchings v. Lampson*, 82 Fed. 960, that the limitation applicable was that prescribed for actions upon unwritten implied contracts.

It is not true, as asserted by counsel for appellant, that the right to own shares, or to become a member of a corporation, is dependent on the prior execution by the shareholder of a written contract defining his relationship or obligation. Corporate shares are a species of personal property, capable of being acquired and aliened in like manner as other properties and rights of a personal character. The certificate is mere evidence of ownership. Thus in *Davis v. Stevens*, heretofore cited, the individual liability created by the statute was enforced against a person whose name never appeared on the books of the bank as a stockholder. The individual liability created by statute is enforceable, not because of a written contract of membership, but in spite of such contract. If an express contract on its face provided against the stockholders' liability, the liability created by the act of con-

gress would, nevertheless, be enforceable. This has been repeatedly held and citation of authorities to the point is deemed to be needless.

The point made by appellant that actions of this nature are transitory in character, and may be maintained outside of the jurisdiction of the state imposing the liability, is not material or controlling on the question of the statute of limitations as applied to this case. The grounds on which the federal courts have held such actions to be transitory are consistent with respondent's contention that the liability is upon an implied contract not in writing. The case from the circuit court of appeals of the second circuit, referred to at page 44 of appellant's brief, is *Whitman v. Bank*, 51 U. S. App. 543. The decision follows the United States supreme court decision in *Huntington v. Attrill*, 146 U. S. 657, and adjudges the remedy prescribed by the Kansas statute in favor of corporation creditors against shareholders to be transitory, and enforceable without the state, on grounds entirely consistent with the ruling of the circuit court of appeals in the case at bar. The court quotes the following from the opinion in *Huntington's Case*:

As the statute imposes a burdensome liability on the officers for their wrongful act, it may well be considered *penal* in the sense that it should be strictly construed. But as it gives a civil remedy at the private suit of the creditor only, and measured by the amount of his debt, it is, as to him, clearly *remedial*. To maintain a suit is not to administer a punishment imposed upon an offender against the state, but simply to enforce a private right secured under its laws to an individual. We can see no ground, or principle, for holding such a statute to be a penal law, in the sense that it cannot be enforced in a foreign state or country.

The opinion then proceeds:

As the statute was not penal it is not important whether the liability is called *statutory* or one based upon

*contract*. It is *statutory* because it did not exist at common law, and it is *contractual*, because "every one who becomes a member of the company by subscribing to its stock assumes this liability."

It is thus clearly recognized that the statute is the source of the liability. In the sense that the liability does not exist at common law, or independent of the statute, it is clearly recognized to be statutory. But being remedial in the sense that it affords a remedy to the creditor only, and for the amount of the debt, the action is transitory in character.

The rule of the federal court is that where the maintenance of the suit operates merely to administer a punishment imposed upon an offender against the state, the action is penal, and local; but that a remedial statute affording a civil remedy to creditors, though purely statutory, is transitory in character and enforceable without the state. Within this rule it is conceded the action here is transitory, but the fact that it is transitory has no bearing on the question as to whether it is on an implied contract not in writing.

It is not deemed necessary to discuss at length the cases cited in appellant's brief, pages 36 to 41, inclusive, to the effect that the grantee of a deed or other written instrument, who accepts the writing and asserts rights under it, is bound by the covenants therein contained, without formally executing the instrument as joint maker with the other contracting party. There has been no contention between the parties as to the correctness of this doctrine, and it hardly required reference to the cases to establish a proposition so simple and elementary. It has, however, no application to any question raised by the record here presented for review. It is not alleged in the bill that respondent ever accepted any grant of privileges from the corporation by an instrument in writing obligating him to pay the receiver of

the bank or its creditors the sum sued for. Nor is it alleged that respondent ever in any manner obligated himself *in writing*, of any character, to pay the money sought to be recovered in this action. Nor does the liability by the terms of the banking act attach to the original subscriber. The shares, as already shown, are transferable like any other species of personal property. The liability is contingent, depending upon the bank's becoming insolvent; and it then attaches to the present shareholders and does not affect the original subscriber or any intermediate holder of the shares. The contention that the bill brought to enforce the liability imposed by the banking act is upon a written contract of subscription, or upon a written transfer of shares, or upon a stock certificate—the mere voucher evidencing ownership—without defining what instrument evidences the written obligation, and without averment in the bill of any such written obligation, is so obviously unsound that it ought not, perhaps, to arrest the attention of counsel, much less of the court. The citations above referred to will, therefore, be dismissed as wholly inapplicable to the case.

The cases cited by appellant to the point that the liability sought by the bill to be enforced is contractual are in no respect inconsistent with the contention of appellee that the limitation of four years applies to this case. Most of the cases are in fact cited and relied upon by appellee as sustaining his contention that the liability, if contractual, is on an implied contract, and not upon a contract in writing.

The case of *Howell v. Roberts*, 29 Neb. 483, cited to this point, and *Coy v. Jones*, 30 Neb. 788, which might have been cited, merely hold that the limitation of one year for bringing actions for enforcement of a penalty or forfeiture did not apply. It was not held, however, that the action was on a written contract. The statute was said to be *quasi*-penal, but not a penalty within the meaning of the one-year statute. Later, however, the same

statute was held to be penal, and the cases above mentioned were expressly overruled. (*Globe Pub. Co. v. State Bank*, 41 Neb. 483.) In a still later case it is held the four years' limitation applies to suits brought to enforce the individual liability of stockholders. (*Van Pelt v. Gardner*, 54 Neb. 705.)

*Davis v. Weed*, 44 Conn. 569, distinctly recognizes that the liability is one imposed by statute. It is not asserted to be upon a written contract. On the contrary, it cites with approval the case of *Corning v. McCulloch*, which, as already shown, holds the stockholder's liability to arise from the implied assent of the parties.

Counsel's illustration (Brief, p. 33) of the case of a promissory note drawing 7 per cent interest by force merely of the statute establishing interest rates is not applicable to the case before the court. The supposed case bears no analogy to the liability imposed upon shareholders by the national banking act. The office of the statute fixing a rate of interest in such cases is merely to prescribe a measure of damages for the non-performance of a contract obligation to pay money. There the obligation to pay interest does not exist by force of the statute alone. Without the obligation to pay the note, there is no obligation to pay interest. Damages by way of interest is a mere incident to the contract obligation, and is not the primary substantive engagement. On the other hand the obligation imposed by the statute against stockholders exists independent of the contract between the shareholder and the corporation. Instances have arisen where the terms of the contract obligation of the stockholder exonerate him from payment of the statute obligation. Notwithstanding this the courts enforce the burden imposed by statute. In the latter case, the only promise or contract following the statute is an implied one. The promise in such case is a mere incident of the statute liability. The situations presented in the case at bar and in the supposed case are, therefore, entirely dis-

similar. In one case the damages by way of interest follow solely from the non-fulfillment of an express contract obligation. In the other case the statute imposes the principal and entire obligation by its own inherent and superior force, and this obligation is enforceable, regardless of the terms of any contract, and in spite of existing contracts that the shareholders shall not answer for it.

The argument that the liability here sought to be enforced against the shareholder is that of a partner is likewise without merit. Partners are liable jointly, each member for all the debts of the partnership to the utmost farthing of his property. At common law a partnership is known only by the names of the individual members who compose it. Here there is a distinct corporate entity known by its corporate name and required to act as an artificial person. The liability imposed by the statute upon the shareholders is not a joint liability. One shareholder is not answerable for the debts of the other and cannot be sued jointly with another shareholder. A distinct liability is imposed upon the individual members, limited to the amount of stock held at its par value.

In conclusion we have to suggest that the doctrines contended for by appellant have nowhere received judicial sanction by the courts called upon to administer the national banking act and to define the liabilities created thereby. If the position of appellant is upheld it would result, practically, in the establishment of a class of actions arising by virtue of section 5151 of the Revised Statutes, subject to no limitation whatever. Receivers of national banks would constitute a class of privileged plaintiffs, subject to no limitation of time in which to institute actions against shareholders. Comptrollers in charge of this department, during successive administrations, may have, on complete investigation, determined to withhold action in particular cases as unfounded and unjust; and notwithstanding such determination, counsel

or receivers might, by authority of a new officer, after the evidence of the transaction had been lost, be permitted to fret innocent persons with actions brought against them after all their witnesses are dead. As was said by Chief Justice MARSHALL, in *Adams v. Woods*, 2 Cranch, 336: "This would be utterly repugnant to the genius of our laws. In a country within which not even treason can be presented after the lapse of three years, it can scarcely be conceived that an individual would remain forever liable for a pecuniary forfeiture."

IV.

**The recognized procedure for enforcement of the individual liability of stockholders in national banks is by an action at law. The action in equity is not, therefore, maintainable.**

WHEN the Comptroller orders an assessment, he conclusively fixes and establishes the amount of the stockholders' liability. In this case the bill discloses that the call was made upon the stockholders for the full amount of their statutory liability, namely, "to the extent of the amount of their stock therein at the par value thereof." There is here no marshaling of assets or liabilities to be had in court. In the action brought for enforcement of this assessment no relief is sought but the recovery of a sum certain; and for this a judgment at law is a plain, adequate and complete remedy, precluding the right to sue in equity. (*Kennedy v. Gibson*, 8 Wall. [U. S.] 498; *Casey v. Galli*, 94 U. S. 673; *Flash v. Conn*, 109 U. S. 371; *Bailey v. Sawyer*, 4 Dillon, 463.)

The bill alleges that Mr. Thompson was in fact owner of the shares on which the assessment is made at the time the bank failed, and avers that the proceedings for their previous transfer were colorable only. The object of the

suit, therefore, is enforcement of a purely legal demand by recovery of a mere money judgment. On the averments of the bill respecting the ownership of the shares and their former colorable transfer, complainant had not lost his legal remedy. As heretofore pointed out, there is no prayer in the amended bill to set aside the transfer. In construing the bill it is important also that complainant has omitted to implead the transferees, without whom the court is powerless to grant any relief other than that which may be had in the action at law. The bill is framed on the mistaken view that a mere colorable transfer will operate to deprive complainant of his remedy at law.

*Davis v. Stevens*, 17 Blatchf. 259, is a case decided by the late Mr. Chief Justice WAITE while holding the circuit court of the United States for the southern district of New York in 1879. The suit was at law to recover an assessment of a shareholder in a national bank, who, to conceal his ownership and escape individual responsibility, caused the stock to be transferred to another person pecuniarily irresponsible. In the opinion of the chief justice, reversing the district judge, who had directed a verdict for defendant, it was said:

So far as Elston was concerned, the transfer to him was colorable only, and it is apparent that the only object Stevens had in causing it to be made was to conceal his ownership and thus, if possible, escape all statutory liability. Such being the case, I am unable to see how he can occupy any different position from what he would if the stock had been taken directly from his own name on the books and put in that of Elston. He is still the real owner, with Elston as his agent specially authorized to hold for him the legal title. Every principal is responsible for the obligations of his agency. The debt of the agent is the debt of the principal, and always recoverable from the principal. By the rules of law which govern the relation of principal and agent, the registry on the books in the name of Elston was, as between Stevens

and Elston, in legal effect the same as a registry in the name of Stevens. The obligations which Elston assumed by reason of such registry, were the obligations of Stevens.

And so it was held by WAITE, Chief Justice, that in law Stevens was a shareholder of the bank, though his shares were nominally held and registered in the name of Elston; and that he was answerable in a suit at law for the amount of the assessment. If the views of the late chief justice are adopted here, it will necessitate an affirmance of the decree rendered by the district judge, upon the ground that complainant had an adequate remedy at law.

In *Houghton v. Hubbell*, 33 C. C. A. 574, the circuit court of appeals for the first circuit, as late as January 19, 1899, held to the rule announced in *Davis v. Stevens*. The case was error to review a judgment rendered in the United States circuit court for the district of Massachusetts, in an action at law. The shares of stock on which the assessment had been made did not stand on the books of the bank in the name of the defendant, but the holding was, nevertheless, that the real owner of shares of stock in a national bank which, by his procurement or permission, stand on the books of the bank in the name of an agent and have never been in his own name, may be charged as a shareholder for an assessment made by the comptroller in an action at law. Reference in the opinion is made to the case of *Davis v. Stevens*, and the opinion proceeds:

The last case cited was decided by the late Chief Justice WAITE, sitting in the southern district of New York. The question was like the one under consideration, except that there the actual owner had fictitiously transferred his stock on the books of the bank to another, the difference therefore being that the actual owner in that case transferred his stock to an agent, or a fictitious person, rather than allow it to remain in the name of an agent.

as was done by the owner in this case. It is difficult to perceive, however, that such a situation involves a different principle from that of the question before us. Indeed, the learned justice said, at page 260, 17 Blatchf., and page 177, 7 Fed. Cas.: "The point to be decided now is whether, in an action at law by a receiver of the bank, the real owner of stock in a national bank, standing, by his procurement, in the name of another, and never having been in his own name on the books, can be charged, as a shareholder, with the statutory liability for debts." Again, at page 261, 17 Blatchf., and page 178, 7 Fed. Cas., after discussing the question of the liability of the registered shareholder, the learned justice observes: "The question still remains, however, whether the person for whom the registered owner holds the stock, if actually the owner, may not also be liable." As a result of the reasoning in that case, at page 263, 17 Blatchf., and page 178, 7 Fed. Cas., he said: "I cannot reach any other conclusion than that Stevens, the decedent, was, in law, a 'shareholder' of the bank at the time of its failure, and, as such, liable in this action." The point involved in *Pauly v. Trust Co.*, 165 U. S. 606, 17 Sup. Ct. 465, was not precisely like the point before us, yet that case and the one under consideration would seem to be on parallel lines; and Mr. Justice HARLAN, after analyzing the prior cases relating to the liability of shareholders in national banking associations, states the rules deducible therefrom, and among other things says (page 619, 165 U. S., and page 470, 17 Sup. Ct.): "The real owner of the shares of the capital stock of a national banking association may, in every case, be treated as a shareholder, within the meaning of section 5151." The reasoning of Chief Justice WAITE in *Anderson v. Warehouse Co.*, 111 U. S. 479, 483, 4 Sup. Ct. 525, is to the same effect. It is according to principle that a burden of this character should rest upon the actual owner, and, as a general rule, there is no safer party to pursue than the actual responsible owner, on whom the ultimate liability must rest. Assuming that an assessment could have been successfully maintained against the agents who stood upon the bank records as owners, still the comptroller might properly, in his discretion, elect to pursue directly the actual known owner. In doing so in this case, the comptroller

elected the more equitable of the legal remedies, and the one which sensibly avoided circuity of action and unnecessary litigation, by striking at once the source upon which, if no exceptional circumstances exist, and necessary remedies were employed by the agents, the statutory burden must finally fall. It cannot be seen that any legal rule interposes, in a situation like this, to prevent reaching a result directly which admittedly can be reached indirectly. Neither can we see any prudential reason for pursuing an indirect legal course when a direct one is fairly and plainly open.

The individual liability provided by the banking act attaches to the *bona fide* owner of the shares when the bank becomes insolvent. The issue as to ownership, except in those cases where it is necessary first to bring all the parties to an actual transfer of shares before the court and set it aside by decree, may always be determined in a suit at law. Thus, it has been repeatedly held that a former stockholder may show in avoidance of an assessment that he had parted with his shares before the bank's insolvency, even though the officers had neglected to make the transfer upon the books, and his name still appeared on the list of stockholders. In such case the stockholder wrongfully sued has his remedy at law, and is not required first to resort to equity for the purpose of enforcing the execution of a transfer upon the books of the bank. Ownership in fact determines the liability, and the issue can be raised in a suit at law and there adjudicated. The bank record is *prima facie* evidence of ownership; but the real fact may be determined without invoking the chancery powers of the court either to decree execution of a transfer, or to cancel a fictitious or colorable transfer. (*Whitney v. Butler*, 118 U. S. 655; *Earl v. Coyle*, (C. C.) 93 Fed. 99; *Earl v. Coyle*, (C. C. A. 3d Circuit) 97 Fed. 410; *Young v. McKay*, (C. C.) 50 Fed. 394.)

The case here is clearly distinguishable from those

where it has been permitted to proceed in equity against both transferrer and transferee. The situation in the latter cases presented an obstacle to the prosecution of the suit at law, and required as incident to enforcement of any assessment against the transferrer, that the transfer be set aside; and to bring the matter within the control of the court, all parties were necessarily impleaded as defendants who were connected with the transfer, and whose rights would be affected by the decree to be rendered. Here the averments of the bill make the case clearly one for a court of law. If the foregoing precedents are to have weight, the ruling of the district judge should be upheld on this specific ground.

V.

**If the subject-matter of the bill be held to present a case for equitable cognizance, then the bill was demurrable for want of necessary parties.**

THE objection to the bill based upon this ground has not been met by appellant. Appellant's counsel, at page 52, assume that appellee cannot now be sued at law, but this assumption, on the authority cited in the preceding point, is shown to be false. Courts of law on this precise state of facts entertain suits for the enforcement of the assessment, and have power to enter judgment. As heretofore argued, this is not a case where the setting aside of the transfer is an incident or condition precedent to the enforcement of the liability against appellee. The original bill, it is true, contained a specific prayer to set aside the transfer, but the hearing upon that bill having developed the necessity of impleading the other parties to the transfer, complainant in the amended bill omitted to pray for such relief, and sought only a personal judgment. No case has been presented in which a court of equity has entertained a proceeding of this character.

In *Stewart v. Hayden*, 169 U. S. 1, the transferees were before the court and had answered to the bill. They not only assented that the transfer should be set aside, but by cross-bill joined the receiver in a specific prayer that it be done, and that the assessment be charged against their transferrer. The theory on which the amended bill was there framed was that the transfer itself operated to deprive the complainant of his remedy at law, and preliminary and incident to enforcing the assessment against Stewart was the necessity of setting aside the transfer. As the amended bill was there framed, it presented, therefore, a case of equitable cognizance. The supreme court say (page 1):

> The original bill was against Stewart alone, but a demurrer for want of parties having been sustained, an amended bill was filed against Stewart, Gruetter, and Joers.

Nowhere, either in the opinion of the court of appeals, or of the supreme court, is the ruling of the circuit court requiring the transferees to be made parties discredited, nor is it by either of the reviewing courts intimated that without having the transferees before it, the case would have been one of equitable cognizance, or that relief could have been given in equity.

In *Borden v. Johnson*, 107 U. S. 256, cited by appellant to this point, the question of want of necessary parties was not, and, on the record, could not be raised. Mrs. Valentine, the transferee, was in fact joined as a defendant with Johnson, and both defendants united in answering the bill. This fact is recited in the statement of the case, and it is nowhere in the opinion suggested that Mrs. Valentine was not a necessary party to a proceeding in equity to set aside the transfer, nor that without her presence in the case the complainant would have been entitled to relief in equity. The bill in that case was for discovery, as well as relief, and the necessary parties

being before the court, the jurisdiction was sustained. That the bill was there entertained for the purpose of setting aside the transfer as a precedent step to enforcement of liability, is manifest from the following language found in the opinion:

> This being a bill for discovery, as well as relief, and the fraudulent transfer being good between the parties, and only avoidable at the election of the plaintiff, it is clear that equity has jurisdiction *to set it aside* and enforce the liability of the transferrer.

The practice in this class of cases, therefore, has been to follow the well-established rule that in an action to set aside a fraudulent conveyance, the fraudulent grantee or assignee is a necessary party defendant. The powers of the equity court to set aside a fraudulent transfer are exercised only where it has before it all parties to be affected thereby. It is true in this case no affirmative judgment is asked against any other person than the appellee, but in equity the rule as to parties is not dependent upon whether the object of the decree is to impose a liability or to confer a benefit. In either case all of the parties to the contract which the suit seeks to annul or avoid must be before the court. (*Gray v. Schenck*, 4 N. Y. 460; *Tiebout v. Allen*, 13 Gratt. (Va.) 15; *Hamlin v. Wright*, 23 Wis. 491; *Walker v. Powers*, 104 U. S. 245, 251.) It is clear, therefore, that until the transferees are made parties, the court is powerless to grant any relief other than that which may be had at law; and that for want of these parties the bill is demurrable.

A person who is entered on the books of a national bank as the owner of stock, but who is admitted to hold the stock in trust for the true owner, is not liable as a stockholder for the debts of the bank, when the true owner has been adjudged liable; and this is true even though nothing has been realized upon the execution on such judgment. Creditors cannot hold both apparent and real owners. (*Yardley v. Wilgus*, 56 Fed. 965.)

There seems to be no specific holding against the doctrine announced in the above case. If, by reason of a questionable transfer, the receiver is not able to determine who is the proper person to pursue for enforcement of the assessment, and resort to equity in such case is permissible, even then correct practice would require both persons possibly liable to be impleaded as parties defendant to the bill. In such case, only, could a bill for discovery be justified or effective. For then, on ascertainment of the real owner, judgment on any contingency could be rendered against the person liable, and possible necessity of two suits avoided; and the rights of the defendants, as between themselves, could also be determined. Unless the case presented by the bill involves some such equitable considerations, there would be no necessity for resort to equity. Where there is a sole defendant sought to be held liable as owner of the shares, a full and complete remedy is afforded by the action at law, as shown by the authorities cited in the last preceding point.

The lower courts in determining the case applied doctrines universally recognized and enforced in favor of suitors in the same situation in which they found the appellee. Appellant, therefore, has no just ground of complaint, and the judgments of the circuit court, and the circuit court of appeals, dismissing the bill, should be affirmed.

Respectfully submitted,

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Lincoln, Neb., Oct. 21, 1901.